U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NOS. 2023-0040 2023-0045**
PROSECUTING PARTY,	**ALJ CASE NO. 2019-TNE-00011 ALJ THEODORE W. ANNOS**
v.	**DATE: February 27, 2025**
LUCERO POOL PLASTER, INC.,	
RESPONDENT.	

Appearances:

For the Complainant:
Jennifer S. Brand, Esq., Rachel Goldberg, Esq., Jennifer Stocker, Esq., Jennifer Huggins, Esq.; *United States Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
R. Michael Northrup, Esq., Brian T. Farrington, Esq.; *Cowles & Thompson, P.C.*; Dallas, Texas

Before WARREN and THOMPSON, Administrative Appeals Judges

DECISION AND ORDER

WARREN, Administrative Appeals Judge:

This case arises under the H-2B provisions of the Immigration and Nationality Act (INA),[1] as amended, and its implementing regulations.[2] On June

[1] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b); 1184(c)(14).

[2] 20 C.F.R. Part 655, Subpart A; 29 C.F.R. Part 503.

20, 2023, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) finding that Respondent Lucero Pool Plaster, Inc. violated provisions of the INA covering the period April 1, 2016, to September 30, 2017.[3] Both Respondent and the Administrator for the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) appealed to the Administrative Review Board (Board). For the following reasons, we affirm in part and vacate and modify in part.

BACKGROUND

1. H-2B Program

The H-2B program permits employers to hire temporary foreign workers to perform nonagricultural services or labor in the United States. Employers may only hire foreign workers under the H-2B program if (1) there are not sufficient U.S. workers who are qualified and available to perform the temporary services or labor, and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.[4]

Under the program's regulations, employers seeking to employ H-2B workers must obtain a certification from the U.S. Department of Labor (DOL).[5] To obtain a certification, the employer must file the ETA Form 9142B, Application for Temporary Employment Certification (TEC) with the DOL's Office of Foreign Labor Certification (OFLC).[6] The employer must sign the TEC under the penalty of perjury, attesting to their knowledge of, and agreeing to comply with, the terms and conditions of the H-2B program.[7] The regulations require an employer to abide by conditions that relate to, *inter alia*, non-discriminatory hiring practices, prohibition against preferential treatment of foreign workers, rates of pay, area of intended employment, transportation and visa fees, transportation from the place of employment, disclosure of job order, contracts with third parties, and retention of documents and records.[8]

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3 D. & O. at 1, 3.

4 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 29 C.F.R. § 503.1(a); 8 C.F.R. § 214.2(h)(6)(iii)(A).

5 20 C.F.R. § 655.1.

6 *Id.* § 655.15.

7 *Id.* § 655.18; 29 C.F.R. § 503.19(d).

8 20 C.F.R. § 655.20; 29 C.F.R. §§ 503.16, 503.17.

As part of the certification process, the employer must make an effort to recruit U.S. workers to ensure that there are no qualified U.S. workers available for the position it intends to fill with H-2B workers.[9] The employer must submit a job order to the State Workforce Agency (SWA) serving each geographical area of intended employment listed in the TEC.[10] A job order is a document containing all the material terms and conditions of employment for the position(s) for which H-2B workers are sought.[11] The employer must also advertise the position(s) to U.S. workers, and the advertisements must describe the geographical area of intended employment "with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor."[12] The employer must offer the same wage and other benefits and terms and conditions of employments to U.S. workers that it will offer H-2B workers.[13]

2. Factual Background

Respondent is a swimming pool plastering and remodeling company based in Schaumburg, Illinois, and is co-owned by Hector Alvino Guzman and Carlos Lucero.[14]

On January 26, 2016, Respondent filed a TEC with the OFLC.[15] OFLC accepted the TEC and granted Respondent's request to hire twenty construction laborers from April 1, 2016, to September 30, 2016.[16] Respondent signed Appendix B to the TEC under penalty of perjury, attesting to their knowledge of, and agreeing to comply with, the terms and conditions of the H-2B program.[17]

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9 20 C.F.R. § 655.40(a).

10 *Id.* § 655.16(a)(1).

11 *Id.* § 655.5.

12 *Id.* § 655.541(b)(2).

13 *Id.* § 655.518.

14 D. & O. at 6.

15 *Id.* at 3.

16 *Id.*

17 *Id.* at 8.

On January 12, 2017, Respondent filed another TEC for the 2017 season.[18] OFLC accepted the TEC and granted Respondent's request to hire twenty construction laborers from April 1, 2017, to September 30, 2017.[19] Respondent again signed Appendix B to the TEC under penalty of perjury, attesting to their knowledge of, and agreeing to comply with, the terms and conditions of the H-2B program.[20]

During both 2016 and 2017, Respondent failed to follow through on several attestations made in the TECs. As discussed in below, Respondent: (1) offered housing to H-2B workers without disclosing that benefit in the job order;[21] (2) assigned H-2B workers to higher-paying union jobs, without advertising the potential for hiring paying jobs to U.S. workers;[22] (3) did not pay H-2B workers the wage rate listed on the TECs for all hours worked;[23] (4) assigned H-2B workers to work outside the geographic areas certified on the TECS;[24] (5) failed to pay all inbound and outbound transportation and subsistence costs;[25] (6) failed to provide

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18 *Id.* at 3.

19 *Id.*

20 *Id.* at 8.

21 *Id.* at 20.

22 *Id.* at 21. The parties stipulated that twelve H-2B workers worked at least one week on a union paying project in 2016, which paid $75 per hour instead of $27.46 per hour, and at least one week on a union project in 2017, which paid $75 per hour instead of $27.35 per hour. *Id.* at 10, 21. Respondent failed to disclose the possibility of higher paying union jobs in its SWA job order, ETA Form 9142B, and newspaper ads. *Id.*

23 *Id.* at 7-8, 14.

24 *Id.* at 11-12. Specifically, in 2016, Respondent identified the area of intended employment as Cook County-Chicago-Naperville-Joliet Metropolitan Division area. However, Respondent's H-2B workers worked in the following locations in Wisconsin: Sheboygan, Williams Bay, Kenosha, Lake Geneva, Delavan, and Milwaukee; in Michigan: Union Pier and Three Oaks; and in Indiana: Granger, Syracuse, Merrillville, South Bend, and Warsaw. Similarly, in 2017, Respondent identified the area of employment as Cook County-Chicago-Naperville-Arlington Heights Metropolitan Division. However, Respondent's H-2B workers worked in the following locations in Wisconsin: Milwaukee, Madison, Greek Lake, Waunakee, Somers, Kenosha, Fedonia, Rice Lake, Waukesha, Wisconsin Dells, Mequon, Wauwatosa, Menomonee Falls, Glenbeulah, Lakeside, Green Bay, Lake Geneva, Oak Creek, Baraboo, Middleton, Heartland, Elm Grove, River Falls, Window, Newton, Glendale, Sheboygan, and Hazel Green; in Michigan: New Buffalo, Sawyer, Cassopolis, Grand Beach, and Buchanan; in Indiana: Elkhart, Michigan City, and West Layfayette; and in Decorah, Iowa. *Id.*

25 *Id.* at 12-13, 38-40.

H-2B workers with a copy of the job order;[26] (7) failed to contractually prohibit its agents from seeking or receiving fees from H-2B workers;[27] and (8) failed to retain documents related to its TECs for three years.[28]

3. Procedural Background

On November 14, 2018, the Administrator for the WHD issued a Determination Pertaining to Violations Involving H-2B Nonimmigrant Workers and Notice of Debarment (Determination Letter) to Respondent.[29] The Administrator found that Respondent committed the above violations related to its 2016 and 2017 TECs.[30] The Administrator ordered Respondent to pay $334,195.09 in unpaid wages, $396,440.67 in Civil Money Penalties (CMPs), and debarred Respondent from participating in the H-2B program for three years.[31]

Respondent objected to the Determination Letter and requested a hearing before an ALJ.[32] The ALJ held a hearing from July 27 to 29, 2021.[33] On June 20, 2023, the ALJ issued the D. & O. The ALJ determined that Respondent committed some, but not all, of the violations identified by the Administrator, ordered Respondent to pay a total of $436,374.64 in back wages and CMPs, and debarred Respondent for a period of one year.[34]

Both parties petitioned the Board to review the D. & O.[35]

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26 *Id.* at 13, 42.

27 *Id.* at 13, 43-44.

28 *Id.* at 12, 44-45.

29 *Id.* at 3.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 4.

34 *Id.* at 57-58.

35 On July 11, 2023, the parties filed a Joint Motion to Extend Time to Consider and Potentially File Petition for Review (Joint Motion to Extend) with the Board. In the Joint Motion to Extend, the parties jointly requested an extension of time "to consider and potentially file petitions for review of" the D. & O. The ARB granted the Joint Motion to Extend, giving the parties until August 21, 2023, to file petitions for review. Respondent filed a Petition for Review on August 18, 2023, and the Administrator filed a Petition for

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final determinations under the H-2B program.[36] The Board reviews an ALJ's decision de novo[37] and acts with "all the powers [the Secretary] would have in making the initial decision."[38]

DISCUSSION

Upon review of the ALJ's D. & O., the parties' arguments on appeal, and the record, the Board: (1) concludes that Respondent violated the INA and H-2B regulations' prohibition against giving preferential treatment to H-2B workers by failing to advertise the availability of housing to U.S. workers, but did not violate the INA or H-2B regulations by failing to advertise the potential availability of higher-paying union work; (2) affirms the ALJ's findings on all remaining violations; (3) orders Respondent to pay CMPs for giving H-2B workers preferential treatment by failing to advertise housing to U.S. workers; (4) vacates and modifies the ALJ's order of CMPs for the failure to pay the correct wages and for all hours worked; (5) vacates and modifies the CMPs owed for placing workers outside the area of intended employment; and (6) vacates the ALJ's order of a one-year debarment and orders that Respondent be debarred for three years.[39]

Review on August 21, 2023. The Administrator's Petition was assigned ARB case number 2023-0040, and Respondent's Petition was assigned ARB case number 2023-0045. The two appeals were consolidated for the purposes of rendering a decision.

[36] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[37] *See Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Am. Truss*, ARB No. 2005-0032, ALJ No. 2004-LCA-00012, slip op. at 2-3 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affs.*, ARB No. 2004-0100, ALJ No. 2002-LCA-00025, slip op. at 8 (ARB Jan. 31, 2007) (for the proposition that "ARB applies de novo review in INA cases.")).

[38] 5 U.S.C. § 557(b).

[39] Respondent also argues on appeal that the Administrator's Determination Letter violated its due process rights by failing to cite to any of Respondent's conduct that the Administrator determined to be willful and for classifying every violation as a substantial failure without providing the reasons for rendering that determination. Respondent's Brief (Resp. Br.) at 19, 21-23, 38, 44-45, 50. When an agency initiates enforcement action against a regulated party, due process is satisfied when the party is "reasonably apprised of the

1. Respondent Violated the INA and the H-2B Regulations

A. Legal Standard

An employer violates the H-2B program requirements when it substantially fails to comply with any of the terms and conditions of the H-2B registration, application for prevailing wage determination, TEC, or the H-2B petition (H-2B Forms).[40] To be "substantial," the employer's failure must be both (1) "willful," and (2) "a significant deviation from the terms and conditions of [the H-2B Forms]."[41]

A willful violation "occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions."[42] In determining whether a violation is also significant, the regulations identify a non-exhaustive list of factors that the Administrator may consider, including: (1) the employer's previous history of violation(s) under the H-2B program; (2) the number of H-2B workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s); (3) the gravity of the violation(s); (4) the extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential

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issues in controversy" and "not misled." *L.G. Balfour Co. v. F.T.C.*, 442 F.2d 1, 19 (7th Cir. 1971). To prevail on a due process claim in this context, the party must show prejudicial error not present here. *See Abercrombie v. Clarke*, 920 F.2d 1351, 1360 (7th Cir. 1990). Here, Respondent had sufficient notice. In the Determination Letter, the WHD notified Guzman of the investigation into Respondent pursuant to the H-2B provisions of the INA for the period from January 1, 2016, through September 8, 2017. The WHD cited to the INA and its implementing regulations and informed Respondent of the violations that it committed, the amount of back wages and CMPs owed, and that it was debarred for three years. The WHD also informed Respondent of its appeal rights. In addition, the WHD's interpretation of the violations at issue in the Determination Letter is consistent with the TECs, the INA, and previous cases. Further, Respondent had an opportunity to be heard at the hearing held on July 27 to 29, 2021. Thus, we find that Respondent was reasonably apprised of the issues in controversy and had an opportunity to be heard, satisfying constitutional due process.

40 8 U.S.C. § 1184(c)(14)(A); 29 C.F.R. § 503.19(a)(2).

41 29 C.F.R. § 503.19(a)(2).

42 *Id.* § 503.19(b).

injury to the worker(s); and (5) whether U.S. workers have been harmed by the violation.[43]

B. Preferential Treatment of Foreign Workers: Housing and Union Jobs

The employer's job offer to U.S. workers must include "no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers."[44] In addition, Attestation 4 of the TEC prohibits employers from giving preferential treatment to H-2B workers. The Administrator asserts that Respondent violated these provisions by (1) failing to advertise to U.S. workers that housing was available; and (2) failing to advertise to U.S. workers that higher paying union jobs were available. We address each alleged violation in turn.

i. Respondent's Failure to Advertise Housing was a Willful Violation that Substantially Deviated from the Requirements of the H-2B Program

An employer's job order must specify if the employer provides the worker with the option of board, lodging, or other facilities, or intends to assist workers in securing such lodging.[45] The preamble to the regulations also states:

> If an employer intends to offer housing to H-2B workers, such housing must also be offered to all U.S. applicants who live outside the area of intended employment. Housing secured for workers can be just as easily occupied by U.S. workers as by H-2B workers, or some combination of U.S. and H-2B workers.[46]

Respondent owned a house in Wheeling, IL where eleven H-2B workers lived in 2016 and seven H-2B workers lived in 2017.[47] This house was immediately adjacent to Respondent's shop in 2016.[48] Each year, Respondent charged these H-

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43 *Id.* § 503.19(c).

44 *Id.* § 503.16(q).

45 20 C.F.R. § 655.18(b)(10).

46 80 Fed. Reg. 24,042, 24,071 (Apr. 29, 2015).

47 D. & O. at 20.

48 Respondent's (Resp.) Exhibit B at 2. In 2017, Respondent relocated its shop. *Id.*

2B workers $200 per month in rent.[49] However, both the 2016 and 2017 job orders stated: "Assistance finding and securing board & lodging is not available."[50]

The ALJ found that Respondent knew or should have known that it would provide housing, but failed to advertise the availability of housing to U.S. workers as required.[51] Thus, the ALJ found that Respondent's failure to advertise housing to U.S. workers was willful.[52] However, the ALJ concluded that Respondent did not significantly deviate from the terms and conditions of the H-2B program because of its lack of a history of violations under the H-2B program, the gravity of harm was "minimal," and the Administrator offered "no evidence showing that US applicants were *actually* deterred" from applying for a position with Respondent due to the perceived lack of available housing.[53]

Respondent contends that the ALJ erred in finding that Respondent willfully violated the H-2B program's requirements and asserts that its actions were mere negligence and did not arise to reckless disregard of its obligations under the H-2B program.[54] The Administrator counters that the ALJ correctly determined that Respondent's failure to advertise housing was willful, but contends that the ALJ erred in finding that Respondent's failure to advertise the availability of housing to U.S. workers did not substantially deviate from the terms and conditions of the H-2B program.[55] Specifically, the Administrator contends that the ALJ erred in analyzing Respondent's history of violations and finding that the Administrator

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49 *Id.*

50 Joint Exhibit (JX) E at 1, JX I at 1.

51 *Id.* at 20, 22.

52 *Id.*

53 *Id.* (emphasis original).

54 Resp. Response Brief (Br.) at 13-14; Resp. Br. at 29-31, 34-35, 46 n.15. In addition, Respondent contends that "housing assistance" refers to "monetary assistance with housing, reduced rent, or free housing." Resp. Response Br. at 19. Respondent further contends that there is no evidence in the record that U.S. workers were not provided the same opportunity as H-2B workers to lease housing from Respondent. *Id.* We are not persuaded by either argument based on the language of 20 C.F.R. § 655.18(b)(10), which requires an employer's job order to specify if the employer provides the worker with the option of board, lodging, or other facilities. Respondent indicated that board, lodging, or other facilities were unavailable when they were available.

55 Administrator's Br. at 23.

must produce a U.S. worker who was actually harmed.[56] We find that Respondent's failure to advertise housing to U.S. workers was both willful and a significant deviation from the terms and conditions of the H-2B program.

Guzman contended that he only became aware that housing was available to workers after their arrival in 2016, when he returned from a trip to find that H-2B workers were staying in what he thought was his uncle's house.[57] We are not persuaded by this argument. The record indicates that Respondent offered housing to H-2B workers in 2015, in a home immediately adjacent to Respondent's shop, one year prior to their arrival in 2016.[58] In addition, H-2B workers were informed of the availability of housing prior to their arrival in Illinois.[59] Further, even if Respondent was not aware that housing was available until after H-2B workers arrived in 2016, Respondent offered no explanation as to why Respondent failed to advertise housing in 2017.[60] Thus, we find that Respondent knew or should have known that housing was available.

Respondent's failure to advertise the availability of housing was also willful. On the TEC, the employer must attest that it will abide by the terms and conditions set forth by the H-2B regulations.[61] An employer's submission and signature on the TEC constitutes the employer's representation that the statements are accurate and its acknowledgement and acceptance of the obligations of the program.[62] An employer's failure to read the terms of the TEC or properly learn the H-2B program's requirements amounts to a reckless disregard of the employer's obligations.[63] Thus, we find that Respondent's failure to advertise the availability of house was willful.

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56 *Id.* at 27-28.

57 D. & O. at 20.

58 Transcript (Tr.) at 37-39, 80-81.

59 *Id.*

60 D. & O. at 20, 22.

61 29 C.F.R. § 503.16.

62 *Id.* § 503.19(d).

63 80 Fed. Reg. at 24,086-87; *see Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, ALJ No. 2018-TNE-00023, slip op. at 14 n.72 (ARB Apr. 4, 2022) (citing *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Ave. Dental Care*, ARB No. 2007-0101, ALJ No. 2006-LCA-00029, slip op. at 13 (ARB Jan. 7, 2010) (an employer's ignorance of the INA's requirements does not excuse noncompliance.), and

We also find that Respondent's failure to disclose the availability of housing substantially deviated from the terms and conditions of the H-2B program. First, we find that the ALJ erred in concluding that Respondent did not have a history of violating the prohibition against the preferential treatment of foreign workers. In *Butler Amusements*, the Board recognized that, while an employer may not have a history of WHD violations, a record that evidences a broader lack of adherence to the H-2B rules may be considered in assessing the previous history of H-2B violations.[64] Here, although WHD did not investigate Respondent in 2015, Respondent's failure to advertise housing in 2016 and 2017 was a continuation of a practice that began in 2015, when Respondent first joined the H-2B program.[65] As stated above, testimony demonstrates that Respondent also offered housing in 2015, and that H-2B workers were informed of the availability of housing prior to their arrival in Illinois.[66] This demonstrates a history of a lack of adherence to the H-2B program requirements.

The gravity of the violation was significant. The failure to advertise the possibility of employer-provided housing was not merely an omission. Given that H-2B workers resided in the house in 2015, Respondent knew or should have known that housing was available. However, the job orders specifically stated that "[a]ssistance finding and securing board & lodging is not available" when it was.[67] In addition, as discussed in the paragraph below, Respondent's housing offered a benefit that was not offered to U.S. workers. In addition, the house was immediately adjacent to Respondent's shop in 2016, a significant benefit.[68]

Lastly, U.S. workers were harmed by Respondent's failure to advertise housing. The ALJ found that the Administrator must demonstrate that a U.S.

Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Home Mortg. Co. of Am., 2004-LCA-00040, slip op. at 15 (ALJ Mar. 6, 2006) (an employer's failure to read the terms of the TEC or properly learn about the H-2B program requirements amounts to "reckless disregard.")).

64 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Butler Amusements, Inc.*, ARB No. 2021-0007, ALJ No. 2018-TNE-00019 slip op. at 36-37 (ARB July 28, 2023).

65 Tr. at 37-39, 80-81.

66 *Id.*

67 *Id.*; D. & O. at 20.

68 Resp. Exhibit B at 2.

worker was "*actually* deterred" from applying.[69] However, the regulations do not require that the Administrator procure a U.S. worker who was deterred, but rather, the prohibition of preferential treatment presumes that U.S. workers are harmed when H-2B workers are offered better pay and/or benefits.[70] Here, H-2B workers were offered better benefits than U.S. workers. The house was immediately adjacent to Respondent's shop in 2016, a proximity which could have been a benefit to potential applicants. Thus, we find that U.S. workers were harmed by Respondent's failure to advertise housing.[71]

Therefore, we find that Respondent's failure to advertise the availability of housing is a substantial deviation from the job order,[72] and that Respondent substantially failed to meet the terms and conditions of Attestation 4 in violation of 29 C.F.R. § 503.16(q).

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69 D. & O. at 22.

70 *See* 80 Fed. Reg. at 24,062 ("So long as the employer offers U.S. workers at least the same level of benefits, wages, and working conditions as will be provided to the H-2B workers, the employer will be in compliance with [the prohibition against preferential treatment].").

71 Respondent contends that the ALJ erred by not weighing each of the five factors listed above when determining whether its actions significantly deviated from the terms and conditions of the H-2B program. Respondent's Response Br. at 14-18; Resp. Br. at 11, 19, 27-28, 37-43. The Administrator counters that these factors reflect different ways to measure the significance of a broad array of H-2B employer obligations and the failure to satisfy those obligations. Administrator's Br. at 22. The language of the regulation states that the decision-maker "may consider, but [is] not limited to" considering, the five factors listed above. As such, these factors are discretionary in application. Consideration of these factors must be reasonably related to determining whether the employer significantly deviated from their obligations. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (decision by an agency not based on consideration of the relevant factors or based on a clear error of judgment is arbitrary and capricious).

72 Respondent also argues that housing assistance should be taken to mean subsidized housing. The language in the job order contradicts Respondent's argument. Specifically, the job orders state that "[a]ssistance *finding and securing* board & lodging is not available" (emphasis added). This language focuses on finding and securing housing and is not limited to reducing or subsidizing costs.

ii. Failure to Advertise the Potential Availability of Union Jobs was a Willful Violation but Did Not Substantially Deviate from the Requirements of the H-2B Program

Respondent assigned H-2B workers to at least one higher-paying union job in both 2016 and 2017.[73] The parties stipulated that twelve H-2B workers worked at least one week on a union paying project in 2016, which paid $75 per hour instead of the regular $27.46 per hour certified in the 2016 TEC, and at least one week on a union project in 2017, which paid $75 per hour instead of the regular $27.35 per hour certified in the 2017 TEC.[74] However, Respondent did not advertise the potential for higher paying union-rate jobs to U.S. workers in its SWA job order, ETA Form 9142B, or newspaper ads.[75]

The ALJ found that Respondent's failure to advertise the possibility of higher paying union jobs did not violate Attestation 4 of the TEC or 29 C.F.R. § 503.16(q).[76] The ALJ found that, despite the fact that union jobs were rare and unpredictable, at least one higher paying union job was available every year since 2013.[77] Accordingly, the ALJ concluded that Respondent intended to offer union jobs as they became available, and was therefore required to advertise the opportunity.[78] However, the ALJ found that the failure to advertise the possibility of union jobs was not a significant deviation from the terms and conditions of the TECs because Respondent had no history of violating the H-2B program, the Administrator showed no evidence that U.S. applicants were "actually deterred," and because the gravity was "at most, minimal."[79]

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[73] D. & O. at 21. The parties stipulated that twelve H-2B workers worked at least one week on a union paying project in 2016, which paid $75 per hour instead of $27.46 per hour, and at least one week on a union project in 2017, which paid $75 per hour instead of $27.35 per hour. Respondent failed to disclose the possibility of higher paying union jobs in its SWA job order, ETA Form 9142B, and newspaper ads. *Id.*

[74] *Id.* at 10, 21.

[75] *Id.*

[76] *Id.* at 21-22.

[77] *Id.* at 21.

[78] *Id.*

[79] *Id.* at 22.

The Administrator agrees with the ALJ's finding that Respondent's failure to advertise the potential for higher-paying work was willful, but contends that the ALJ erred in finding that this failure was not a significant deviation.[80] The Administrator contends that the failure to advertise was extremely grave because Respondent "had a consistent history of booking union rate jobs every year since at least 2013" and because "[a] job's pay rate is a key concern to any potential applicant."[81]

Respondent counters that it had no way of knowing in advance if it would have a higher-paying union contract in advance.[82]

We agree with the ALJ that Respondent's failure to advertise the availability of union job was willful. Based on Respondent's history of booking at least one higher-paying union job per year since 2013,[83] Respondent knew or should have known that it would offer these jobs as they became available. Thus, we find that Respondent acted in reckless disregard of its obligations by failing to advertise the potential availability of higher-paying union jobs.

However, we also agree with the ALJ that Respondent's failure to advertise the potential availability of higher-paying union jobs did not substantially deviate from the terms and conditions of the H-2B program. Although Respondent had a history of booking at least one higher-paying union job per year, the work was infrequent and the availability of such jobs was not within Respondent's control.[84]

Thus, we conclude that Respondent's failure to advertise the potential availability of higher paying union jobs was willful, but did not substantially deviate from the terms and conditions of the H-2B program. Therefore, we affirm the ALJ's conclusion that Respondent did not substantially fail to meet the terms and conditions of Attestation 4 in violation of 29 C.F.R. § 503.16(q) by failing to advertise the possibility of union jobs.

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80 Administrator's Br. at 23.

81 *Id.* at 25.

82 Resp. Response Br. at 20.

83 Tr. at 508.

84 However, we disagree with the ALJ's finding that the Administrator must demonstrate that a U.S. worker was actually harmed for the reasons stated above.

C. Underpayment of Wages

Section 503.16(a)(1) states, "[t]he offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the [TEC] granted by OFLC."[85] Section 503.16(a)(4) states that if, at the end of a workweek, the piece rate does not at least equal the amount the worker would have earned based on the offered hourly rate, the employer must supplement the worker's pay to equal at least what the "worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage *for each hour worked*."[86] In addition, Attestation 5 states, "[t]he offered wage equals or exceeds the highest of the most recent prevailing wage for the occupation that is or will be issued by the Department to the employer for the time period the work is performed, or the applicable Federal, State, or local minimum wage."[87]

The ALJ found that Respondent failed to pay H-2B workers both the correct hourly wage rate and for all hours they worked.[88] For the reasons that follow, we affirm the ALJ's findings.

i. Respondent Failed to Pay the Correct Hourly Wage Rate

Respondent did not pay its H-2B workers the wage rate listed on the 2016 and 2017 TECs. On the 2016 TEC, Respondent certified it would pay its H-2B workers a basic pay rate of $27.46 per hour and an overtime rate of $41.19 per hour.[89] However, Respondent only paid its H-2B workers a regular rate of $27.11 and an overtime rate of $40.67.[90] Likewise, on the 2017 TEC, Respondent certified it would pay its H-2B workers a basic pay rate of $27.35 per hour and an overtime

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85 29 C.F.R. § 503.16(a)(1).

86 *Id.* § 503.16(a)(4) (emphasis added).

87 D. & O. at 22-23.

88 *Id.* at 23-32.

89 *Id.* at 7-8.

90 *Id.* at 14.

rate of $41.03 per hour.[91] However, Respondent only paid its H-2B workers an hourly rate of $27.11 and an overtime rate of $40.67.[92]

The ALJ concluded that Respondent's failure to pay the required wage was willful because it acted in reckless disregard of its wage obligation under the H-2B program.[93] The ALJ found that this violation was a significant deviation from the terms and conditions of the TEC because all H-2B workers were affected, the gravity was severe, and Respondent experienced a financial gain.[94]

Respondent contends that the facts do not support a finding of a "willful failure"[95] and asserts that the mere fact that an employer might not have complied with its wage obligations does not demonstrate anything more than negligence, and the ALJ did not otherwise find any facts that would establish Respondent's actions in this case were willful.[96] Respondent also contends that it did not significantly deviate from its wage obligations, and that the ALJ failed to consider Respondent's lack of a history of violations before concluding that the gravity of the violation was severe.[97]

We find that Respondent acted in reckless disregard of its wage obligations under the H-2B program by failing to pay the correct hourly wage rate to its H-2B workers. Respondent did not dispute that it paid its works lower wages than those indicated in the TECs.[98] And, as noted above, in signing the TECs, Respondent attested, under the penalty of perjury, that it knew and accepted its obligations under the H-2B program, including the duty to pay the workers the wages indicated in the TEC. This evidences a reckless disregard for Respondent's obligations under the program.[99]

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91 *Id.* at 8.

92 *Id.* at 14.

93 *Id.* at 24.

94 *Id.*

95 Resp. Br. at 19-23.

96 *Id.* at 32-33.

97 *Id.* at 38-39.

98 D. & O. at 23.

99 80 Fed. Reg. at 24,086-87; *C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, slip op. at 9.

Respondent's actions also demonstrate a substantial deviation from the terms and conditions of the H-2B program. First, Respondent did not dispute that H-2B workers were all underpaid.[100] Thus, we find that all H-2B workers were harmed by the violation. Second, we find that the gravity of H-2B workers' underpayment is severe. The H-2B regulations are meant to protect both U.S. and foreign workers, and underpaying H-2B workers undermines this purpose.[101] In addition, Respondent underpaid H-2B workers by $133,960.50 in 2016, and $167,487.55 in 2017, a significant underpayment.[102] Third, by paying all H-2B workers less than the required wage rate, Respondent achieved a financial gain and H-2B workers suffered a financial loss.[103] Fourth, we find that U.S. workers were harmed. The purpose of paying the prevailing wage is to ensure that the employment of H-2B workers does not adversely affect U.S. workers.[104] Underpaying H-2B workers harms U.S. workers by depressing wages in their industry. Thus, we conclude that Respondent has significantly deviated from the terms and conditions of the H-2B program.

Therefore, we find that Respondent substantially failed to comply with Attestation 5 in violation of 29 C.F.R. §§ 503.16(a)(1), (a)(4), and (b) for not paying the required hourly wage rate.

ii. Respondent Failed to Pay H-2B Workers for All Hours Worked

The ALJ also determined that Respondent failed to pay H-2B workers for all the hours they worked.[105] In total, the ALJ concluded that Respondent owed H-2B workers $133,960.50 in back wages for 2016, and $167,487.55 in 2017.[106]

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100 D. & O. at 23.

101 80 Fed. Reg. at 24,065 ("the payment of the prevailing wage is necessary to ensure that the employment of foreign workers does not adversely affect the wages and working conditions of similarly employed U.S. workers").

102 D. & O. at 22 n.131.

103 *Id.* at 22-23.

104 *See* 80 Fed. Reg. at 24,065 (". . . the payment of the prevailing wage is necessary to ensure that the employment of foreign workers does not adversely affect the wages and working conditions of similarly employed U.S. workers").

105 D. & O. at 24-32.

106 *Id.*

As a threshold matter, Respondent claims that the INA does not require it to pay H-2B workers for all hours worked.[107] However, this argument contradicts the protective purpose of the regulations.[108] Moreover, the regulations make it abundantly clear that the offered wage is the "effective minimum wage" and must be paid for each hour worked.[109]

Next, Respondent contends that the ALJ misapplied the two-step burden-shifting framework articulated in *Anderson v. Mt. Clemens Pottery Co.*[110] in concluding that the evidence established that Respondent failed to pay its H-2B employees for all hours worked.[111] We disagree.

When an employer fails to keep records, an ALJ may use the *Anderson v. Mt. Clemens Pottery Co.* burden-shifting framework.[112] Under the *Mt. Clemens* framework, if the employer's records are "inaccurate or inadequate," the Administrator must show that the workers "in fact performed work for which [they were] improperly compensated" by producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."[113] If the Administrator meets its burden, then the burden shifts to the employer to produce evidence of the precise amount owed.[114] If the employer fails to do so, the court may award damages "even though the result may be only approximate."[115]

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107 Resp. Br. at 21-23.

108 *See* 80 Fed. Reg. at 24,065.

109 *Id.* at 24,063, 24,068-69; 29 C.F.R. § 503.16(a).

110 328 U.S. 680 (1946).

111 Resp. Br. at 12.

112 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Sun Valley Orchards, LLC*, ARB No. 2020-0018, ALJ No. 2017-TAE-00003, slip op. at 17 (ARB May 27, 2021) (affirming the ALJ's application of the *Mt. Clemens* framework).

113 *Mt. Clemens Pottery Co.*, 328 U.S. at 687. This case was superseded by statute. *See Integrity Staffing Sols., Inc.*, 574 U.S. 27 (2014). However, the Board still utilizes this framework. *See Sun Valley Orchards, LLC*, ARB No. 2020-0018, slip op. at 17 (ARB May 27, 2021) (affirming the ALJ's application of the *Mt. Clemens* framework); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Hearn's Enters., LLC*, ARB No. 2022-0050, ALJ No. 2017-SCA-0006, slip op. at 6 (ARB Mar. 10, 2022) (same).

114 *Mt. Clemens Pottery Co.*, 328 U.S. at 687-88.

115 *Id.* at 688.

The ALJ correctly applied the *Mt. Clemens* burden-shifting framework. Employers are required to maintain accurate records of the number of hours each H-2B worker worked.[116] The only records Respondent kept of the hours H-2B workers worked were payroll records.[117] However, Respondent's payroll records are not a reliable indicator of the hours H-2B workers actually worked. Guzman testified that each worker wrote the hours they worked on a sheet of paper and then he transferred that data to a whiteboard, tallied the total number of hours, and then sent the hours to his accountant.[118] After he sent his accountant the data, he discarded the H-2B workers' sheets of paper.[119] Fernando Hernandez, the Assistant District Director of the WHD, testified that crew leaders recorded hours rounding to a whole number on slips of paper, which were not retained, and that the recorded numbers were an estimate.[120]

In addition, U.S. workers and an H-2B worker stated that U.S. workers and H-2B workers worked the same jobs and the same hours. Even so, Respondent compensated U.S. workers for more hours than H-2B workers.[121] Further, several H-2B workers also reported that they worked five to seven days per week for ten to eleven hours per day.[122] Yet, Respondent's payroll records reflected that the H-2B workers only worked 31.79 hours per week in 2016, and 36.42 hours per week in 2017, far below the numbers reported by H-2B workers.[123]

Relying on this evidence, the Administrator reconstructed the hours worked by the H-2B employees. Given the statements and evidence that H-2B workers and

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116 29 C.F.R. § 503.16(i)(1).

117 D. & O. at 24-25.

118 *Id.* at 26.

119 *Id.*

120 *Id.* at 26-27.

121 *Id.* at 28. Specifically, the ALJ found that five U.S. workers stated that H-2B workers worked the same jobs and the same hours as U.S. workers. *Id.* at 28. Likewise, one former H-2B worker testified at the hearing that "U.S. workers and H-2B workers worked side by side, doing the same work. There were no tasks at any job that were exclusively for U.S. workers and not H-2B workers . . . Generally, the nature of each job-related task made it impossible for only the U.S. workers to complete them." *Id.* However, U.S. workers were paid for 12.16 hours more than H-2B workers in 2016, and 16.36 hours more in 2017. *Id.* at 29 n.172.

122 *Id.* at 29.

123 *Id.* at 27.

U.S. workers performed the same duties and worked the same hours, the Administrator calculated wages owed to H-2B workers based on the weekly average hours worked by U.S. workers.[124] From this, we agree with the ALJ that Respondent's payroll records are "inaccurate or inadequate" and that the Administrator carried its burden to produce sufficient evidence to show the amount and extent of the H-2B workers' work as a matter of just and reasonable inference."[125]

We also agree with the ALJ that Respondent failed to produce evidence to show the precise amount of work performed by H-2B workers or otherwise negate the reasonableness of the inference drawn from the Administrator's evidence. First, Respondent contends that U.S. workers worked longer hours than H-2B workers because U.S. workers performed additional tasks that H-2B workers did not perform. However, Respondent failed to produce evidence to show that U.S. workers in fact worked longer hours than H-2B workers. Although Respondent contends that U.S. workers performed different jobs, such as driving forklifts, testimony demonstrates that H-2B workers performed these tasks on occasion as well.[126] Moreover, regardless of the specific job duties workers performed, U.S. workers stated that they worked the same hours as H-2B workers.[127]

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[124] *Id.* at 33-34.

[125] Respondent asserts that the ALJ prematurely shifted the burden to Respondent after deciding that Respondent did not keep adequate records. Resp. Br. at 13. In support, Respondent cites a single sentence of the D. & O. in which the ALJ stated "[b]ecause I found that the payroll records are inadequate, the burden shifts to Respondent [Lucero] to proffer evidence of the precise amount of work performed or to negate the reasonableness of the inference to be drawn from the Plaintiff's evidence." *Id.* (quoting D. & O. at 31). Although that specific sentence, taken out of context, seems to suggest that the ALJ may have prematurely shifted the burden to Respondent under *Mt. Clemens*, it is clear from the remainder of the ALJ's analysis that he found both that Respondent's records were "inaccurate or inadequate" and that the Administrator carried its burden to produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *E.g.,* D. & O. at 29 (finding based on the Administrator's evidence that "H-2B workers, on average, worked 10 to 11 hours a day for 5 to 7 days a week"), 31 (stating, before moving on to Respondent's burden, that "[c]onsistent with the foregoing, I find that Plaintiff demonstrated that Respondent's records are 'inaccurate and inadequate' and provided sufficient evidence to reasonably infer the amount and extent of that work").

[126] Tr. at 548-49, 558.

[127] D. & O. at 30-31.

Additionally, Respondent asserts that the ALJ erred in not crediting the affidavits from eighteen H-2B workers who attested that they were paid for all hours worked.[128] However, the ALJ reasonably gave less weight to these affidavits because they do not specify the number hours each H-2B worker worked or whether those hours differed from U.S. workers' hours. Respondent also did not offer evidence to substantiate the truthfulness of these affidavits because Respondent failed to keep records that would corroborate their statements.[129]

Thus, we agree with the ALJ's application of the *Mt. Clemens* framework and find that Respondent failed to pay H-2B workers for all hours worked.

Next, Respondent contends that, even if the evidence supports a finding that it failed to pay its H-2B workers for all hours worked, the facts do not support a finding that their failure to pay was "willful."[130] Respondent asserts that the mere fact that an employer might not have complied with its wage obligations under the H-2B program does not demonstrate that its lack of compliance was anything more than negligence, and that the ALJ did not otherwise find any facts that would establish Respondent's actions in this case were willful.[131]

Respondent's failure to pay H-2B workers for all hours worked demonstrates a reckless disregard for its obligations under the H-2B program. Respondent attested that it would pay H-2B workers at least the offered wage "during the entire period of the [TEC],"[132] yet it did not.[133] As we noted above, "[t]he fact that employers submit a signed [TEC] attesting under penalty of perjury that they know and accept the obligations of the program" supports a finding of willfulness.[134]

Lastly, Respondent contends that its failure to pay H-2B workers for all hours worked does not arise to a substantial deviation of its obligations under the

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128 Resp. Br. at 17-18, 24-25.

129 *Id.* at 31-32.

130 *Id.* at 19-23.

131 *Id.* at 32-33.

132 *Id.* at 22-23; JX C; JX D.

133 D. & O. at 32.

134 80 Fed. Reg. at 24,086-87.

H-2B program because the ALJ failed to consider all five discretionary factors, including Respondent's lack of a history of violations.[135]

Although Respondent did not have a history of incorrectly paying H-2B workers, the combination of the remaining substantial deviation factors weighs against Respondent. First, because Respondent failed to adequately track the hours each H-2B worker worked and failed to keep appropriate records, the Administrator's initial assessment that its failure to adequately keep records of hours worked affects all H-2B workers is reasonable. Second, the gravity of the underpayment of H-2B workers is severe based on the number of workers affected and the amount the workers were underpaid. The purpose of the INA is to protect U.S. and foreign workers.[136] Paying H-2B workers less than the prevailing wage for all hours worked undermines this purpose.[137] Third, because Respondent did not pay H-2B workers for all hours, Respondent achieved a financial gain and H-2B workers suffered a financial loss.[138] Specifically, the ALJ ordered Respondent to pay $133,960.50 in back wages for 2016, and $167,487.55 for 2017.[139] Fourth, the purpose of paying the prevailing wage is to ensure that the employment of H-2B workers does not adversely affect U.S. workers.[140] Not paying H-2B workers for all hours worked harms U.S. workers by depressing wages in their industry. Thus, we find that Respondent significantly deviated from the terms and conditions of the H-2B program.

Therefore, we find that Respondent substantially failed to comply with Attestation 5 in violation of 29 C.F.R. §§ 503.16(a)(1), (a)(4), and (b) for not paying the required wage rate.

D. Area of Intended Employment

Attestation 11 and 29 C.F.R. § 503.16(x) prohibit employers from placing H-2B workers outside the area of intended employment listed on the TEC. The TEC

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135 Resp. Br. at 38-39.

136 *See* 80 Fed. Reg. at 24,042 (the regulations were issued "to provide for increased worker protections for both [U.S.] and foreign workers").

137 *See id.* at 24,065.

138 D. & O. at 22-23.

139 *Id.* at 33.

140 *See* 80 Fed. Reg. at 24,065.

instructs an employer to "identify the geographic place(s) of employment with as much specificity as possible."

On the 2016 TEC, Respondent identified the area of intended employment as Cook County-Chicago-Naperville-Joliet Metropolitan Division area.[141] However, Respondent's H-2B workers actually worked beyond this metropolitan area, and completed jobs in Wisconsin, Michigan, and Indiana.[142] Likewise, on the 2017 TEC, Respondent identified the area of employment as Cook County-Chicago-Naperville-Arlington Heights Metropolitan Division.[143] Again, however, Respondent's H-2B workers actually worked beyond this metropolitan area, and completed jobs in Wisconsin, Michigan, Indiana, and Iowa.[144]

The ALJ found that there was no factual dispute that Respondent placed H-2B workers outside the area of intended employment in 2016 and 2017.[145] The ALJ also concluded that Respondent acted in reckless disregard for ensuring that H-2B workers stayed within the area of intended employment and that this substantially deviated from the terms and conditions of the H-2B program.[146]

Respondent contends that assigning its H-2B workers to work outside the intended area of employment did not arise to a willful violation of the TEC, but rather that its non-compliance was a mistake.[147] Respondent also asserts that the

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141 D. & O. at 11.

142 *Id.* at 11-12. Specifically, H-2B workers worked in the following locations in Wisconsin: Sheboygan, Williams Bay, Kenosha, Lake Geneva, Delavan, and Milwaukee; in Michigan: Union Pier and Three Oaks; and in Indiana: Granger, Syracuse, Merrillville, South Bend, and Warsaw. *Id.*

143 *Id.* at 12.

144 *Id.* Specifically, H-2B workers worked in the following locations in Wisconsin: Milwaukee, Madison, Greek Lake, Waunakee, Somers, Kenosha, Fedonia, Rice Lake, Waukesha, Wisconsin Dells, Mequon, Wauwatosa, Menomonee Falls, Glenbeulah, Lakeside, Green Bay, Lake Geneva, Oak Creek, Baraboo, Middleton, Heartland, Elm Grove, River Falls, Window, Newton, Glendale, Sheboygan, and Hazel Green; in Michigan: New Buffalo, Sawyer, Cassopolis, Grand Beach, and Buchanan; in Indiana: Elkhart, Michigan City, and West Layfayette; and in Decorah, Iowa. *Id.*

145 *Id.* at 36-37.

146 *Id.* at 37.

147 Resp. Br. at 34.

ALJ erred in finding this constituted a substantial deviation because he did not weigh all five discretionary factors.[148] We disagree.

Respondent's actions demonstrated a reckless disregard for the requirements of the H-2B program. As stated above, an employer's submission and signature on the TEC constitutes the employer's representation that the statements are accurate and its acknowledgement and acceptance of the obligations of the program.[149] Although Guzman asserted that he did not realize that H-2B workers could only work in the areas of intended employment, an employer's failure to read the terms of the TEC or properly learn the H-2B program's requirements amounts to reckless disregard.[150] Thus, we affirm the ALJ's finding that Respondent acted in reckless disregard of its obligations by having H-2B workers work outside the areas of intended employment.

Respondent's actions also demonstrate a substantial deviation from the terms and conditions of the H-2B program. First, every worker was affected during 2016 and 2017.[151] Second, the gravity of this violation is significant. The regulations require employers to identify the area and employment so that the DOL and the Department of Homeland Security (DHS) can determine whether U.S. workers capable of performing at the relevant service or labor cannot be found in the U.S. prior to approving an H-2B petition.[152] Respondent failed to identify forty-five cities across four states in which H-2B workers worked outside the areas of intended employment during 2016 and 2017.[153] Because Respondent failed to identify these additional locations, DOL and DHS were unable to assess whether qualified U.S. workers were available in these locations.

In *5 Star Forestry*, H-2B workers worked in four locations that were not identified in the area of intended employment.[154] The Board found that this

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148 *Id.* at 40. As we found above, these factors are discretionary in application.

149 29 C.F.R. § 503.19(d).

150 80 Fed. Reg. at 24,086-87; *C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, slip op. at 14.

151 D. & O. at 11-12, 36-37.

152 *See* 80 Fed. Reg. at 24,045.

153 D. & O. at 11-12, 36-37.

154 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. 5 Star Forestry, LLC*, ARB No. 2013-0056, ALJ No. 2012-TNE-00010, slip op. at 2 (ARB Nov. 6, 2014).

constituted a substantial deviation from the H-2B regulations, and highlighted the importance of engaging in recruitment efforts to ensure that there are no U.S. workers available to perform the work and because it "advances the INA's goals to protect both domestic and foreign workers by assuring proper enforcement of the INA's H-2B provisions."[155] Because Respondent failed to conduct recruitment efforts of U.S. workers in forty-five cities across four states in this case, we find that the gravity is significant and that this weighs against Respondent.

Respondent was required to conduct recruitment efforts of U.S. workers in the area of intended employment and had forty-five cities in which it did not.[156] As a result, Respondent never demonstrated that capable U.S. workers were unavailable to perform this labor in these locations. Since U.S. workers were not advised of this opportunity in forty-five cities across four states, we find that U.S. workers were harmed and that this factor weighs against Respondent.

Therefore, we find that Respondent substantially failed to meet the terms and conditions of Attestation 11 in violation of 29 C.F.R. § 503.16(x).

E. Transportation and Subsistence Costs

Attestation 17 and 29 C.F.R. §§ 503.16(j)(1)(i)-(ii) require employers to pay all transportation and subsistence costs for H-2B workers' inbound and outbound travel. Respondent only paid some, but not all, of these costs in 2016 and 2017.[157] During both years, H-2B workers stayed in hotels in Monterrey, Mexico for approximately three-to-four days while their paperwork was processed.[158] Guzman testified that he paid for the workers' hotel costs, but did not produce a record of such payments.[159] Guzman admitted that Respondent failed to pay for workers' subsistence from their hometowns to Monterrey and that Respondent only paid "some" costs for a "few" workers.[160]

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155 *Id.* at 6.

156 D. & O. at 36-37.

157 *Id.* at 38-39.

158 *Id.*

159 *Id.* at 38.

160 *Id.*

The ALJ found that Respondent failed to pay all required inbound and outbound transportation and subsistence costs for H-2B workers' travel.[161] The ALJ concluded that Respondent's failure to pay for the entirety of workers' inbound and outbound costs was willful because it demonstrated a reckless disregard for whether it paid for its H-2B workers' required expenses.[162] The ALJ also concluded its failure to pay the required expenses was a significant deviation of its obligations under the H-2B program because a large number of workers were affected and Respondent achieved some financial gain.[163] The ALJ recognized that Respondent did not have a previous history of violations; however, the ALJ gave greater weight to the fact that H-2B workers suffered a financial loss and Respondent experienced a financial gain from this violation.[164]

Respondent contends that the failure to pay for all the H-2B workers' travel expenses was not a willful violation, but rather a mistake that amounts to mere negligence.[165] Respondent contends this alleged violation was also not a significant deviation because the ALJ did not weigh all five factors.[166] Once again, we disagree.

Respondent's actions demonstrated a reckless disregard for the requirements of the H-2B program based on the fact that, by Respondent's own admission, it paid some but not all of the required expenses and its failure to keep adequate records.[167] Although Guzman stated that he was unaware that Respondent had to pay for all inbound and outbound travel and subsistence, an employer's failure to read the terms of the TEC or properly learn the H-2B program's requirements amounts to reckless disregard of its obligations under the program.[168] In addition, before the ALJ, Respondent contended that it relied on the advice of Monarch Butterfly (Monarch), a third-party company Respondent hired to process H-2B workers' visas, and its attorney to handle "all the necessary paperwork and to

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161 *Id.* at 37-40.

162 *Id.* at 40.

163 *Id.*

164 *Id.*

165 Resp. Br. at 34.

166 *Id.* at 40-41, 53. As we found above, these factors are discretionary in application.

167 *Id.* at 38-39.

168 80 Fed. Reg. at 24,086-87; *see C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, slip op. at 14 ("an employer's failure to know the H-2B program's requirements does not excuse a violation").

reimburse necessary costs."[169] However, parties are responsible for the acts and omissions of their freely chosen representatives.[170] Thus, we find that Respondent acted in reckless disregard of its H-2B obligations for failing to pay inbound and outbound travel and subsistence costs.

Respondent's actions also demonstrate a substantial deviation from the terms and conditions of the H-2B program. First, Respondent's failure to pay for H-2B workers' inbound and outbound travel and subsistence expenses affected many H-2B workers. Although Respondent contends that the ALJ erred by not specifying the number of workers affected, Respondent admitted it did not pay for any workers' travel expenses to Monterrey, Mexico, and did not pay for any outbound subsistence expenses.[171] Based on this admission, all H-2B workers were affected, at least, in part.

Second, this violation had a moderate impact on the H-2B workers. As discussed above, Respondent covered some, but not all, expenses and all of Respondent's H-2B workers were affected to at least some extent. In addition, as discussed in the section *infra*, H-2B workers were not compensated a total of $5,863.56 for inbound travel expenses for 2016 and 2017, and $5,249.13 for outbound travel expenses in 2016.[172]

Third, Respondent achieved a financial gain due to the violation, and the H-2B workers suffered a financial loss. Specifically, for inbound expenses, the ALJ found that nineteen workers were owed an average of $168.26 in 2016 and an average of$156.86 in 2017.[173] For outbound expenses, the ALJ found that nineteen workers were owed an average of $276.27 in 2016.[174] In total, the ALJ found that

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169 D. & O. at 39.

170 *See Mikami v. Adm'r, Wage & Hour Div., U.S. Dep't of Lab.*, ARB No. 2013-0005, 2012-LCA-00025, slip op. at 2-3 n.9 (ARB June 16, 2014) ("[P]arties are ultimately responsible for the acts and omissions of their freely chosen representatives."); *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993) ("[C]lients must be held accountable for the acts and omissions of their attorneys."); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962) (stating that where a party voluntarily chose its representation it cannot "avoid the consequence of the acts or omissions of this freely selected agent.").

171 D. & O. at 38-40.

172 *Id.* at 41.

173 *Id.* at 41 n.251.

174 *Id.*

Respondent owed H-2B workers $5,863.56 for inbound travel expenses for 2016 and 2017, and $5,249.13 for outbound travel expenses in 2016.[175] Respondent has not challenged this calculation.[176]

Therefore, we find that Respondent substantially failed to meet the terms and conditions of Attestation 17 in violation of 29 C.F.R. §§ 503.16(j)(1)(i)-(ii).

F. Disclosure of Job Order

Attestation 19 and 29 C.F.R. § 503.16(l) require employers to provide a copy of the job order to H-2B workers in a language understood by workers. However, Respondent did not provide any of its H-2B workers in 2016 or 2017 with a copy of the job orders.[177] Guzman testified that he hired Monarch at the recommendation of his attorney to process H-2B workers' visas in Mexico and assumed Monarch complied with the rules and regulations of the H-2B program.[178]

The ALJ found that Respondent failed to provide H-2B workers with a copy of the job order in a language they understood.[179] The ALJ concluded the violation was willful because Respondent chose Monarch and was aware of its responsibilities to ensure that Monarch complied with the H-2B program's requirements.[180] The ALJ further concluded that this violation was a significant deviation of Respondent's obligations under the H-2B program because the gravity of the violation was severe as none of the workers had information to become aware of the terms and conditions of their employment and their rights under the contract.[181]

Respondent did not specifically challenge the ALJ's finding that it acted in reckless disregard by failing to disclose the job order but does broadly contend that its failures were mere negligence.[182] Respondent also contends that the ALJ erred

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175 *Id.*

176 *See* Resp. Br. at 34, 40-41.

177 D. & O. at 42.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 Resp. Br. at 31-36.

in finding a significant deviation because the ALJ did not address all five regulatory factors.[183] We disagree with Respondent.

Respondent's actions demonstrated a reckless disregard for the requirements of the H-2B program. Again, an employer's submission and signature on the TEC constitutes that employer's acknowledgement and acceptance of the obligations of the H-2B program.[184] Respondent voluntarily chose to hire Monarch to process visas in Mexico and was ultimately obligated for ensuring that Monarch complied with the H-2B programs requirements.[185] Respondent failed to do so.[186] In addition, Respondent's payment of some, but not all, expenses demonstrates that it was aware that it was required to pay these expenses. Thus, we find that Respondent's failure to pay all inbound and outbound costs demonstrates a reckless disregard for the requirements of the H-2B program.

Respondent's actions were also a significant deviation from terms and conditions of the H-2B program. First, Respondent admitted that it did not provide any of its H-2B workers with a copy of the job orders in either 2016 or 2017.[187] As such, this violation affected every worker.

Second, the gravity of Respondent's failure to disclose the job order to H-2B workers is severe. The purpose of the disclosure requirement is "to strengthen worker protection and promote program compliance."[188] Because Respondent failed to disclose the job order to H-2B workers in a language they understood, they were not informed about the terms and conditions of their employment or their rights under the contract. As such, they were unaware that Respondent was violating its obligations under the H-2B program.

Third, H-2B workers were injured because Respondent committed numerous violations and workers had no way of knowing that, since Respondent failed to disclose the terms and conditions of their employment.

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183 *Id.* at 41. As we found above, these factors are discretionary in application.

184 29 C.F.R. § 503.19(d).

185 *See Pioneer Inv. Servs.* 507 U.S. at 396; *Link*, 370 U.S. at 633-34.

186 D. & O. at 42.

187 *Id.*

188 80 Fed. Reg. at 24,069.

Therefore, we find that Respondent substantially failed to meet the terms and conditions of Attestation 19 in violation of 29 C.F.R. § 503.16(l).

G. Contracts with Third Parties to Comply with Prohibitions

Attestation 22 and 29 C.F.R. § 503.16(p) requires employers to contractually forbid third parties from seeking payment from employees. In 2016 and 2017, Respondent employed Monarch to process visas for its H-2B workers in Monterrey, Mexico.[189] However, Respondent admitted that it had no written contract with Monarch for either 2016 or 2017, and it failed to contractually forbid Monarch from seeking payment from Respondent's H-2B workers.[190]

The ALJ found that Respondent failed to contractually forbid third parties from seeking payment from H-2B workers in violation of Attestation 22 and 29 C.F.R. § 503.16(p).[191] The ALJ also concluded that Respondent's actions demonstrated a reckless disregard for ensuring that third parties do not seek payments from employees.[192] Finally, the ALJ also concluded that this violation was a significant deviation of Respondent's H-2B obligations because Guzman acknowledged that this regulation is meant to protect prospective H-2B workers, and because all H-2B workers were affected.[193]

Respondent contends that failing to contractually forbid Monarch from collecting payments from H-2B workers was merely a mistake and was not willful.[194] Respondent also contends that this alleged violation was also not a significant deviation, and that the ALJ failed to consider all five factors.[195] We disagree.

Respondent's failure to contractually forbid Monarch from seeking payments from H-2B workers demonstrates a reckless disregard for the requirements of the H-2B program. Although Respondent contends that this failure was a mere

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189 D. & O. at 43.

190 *Id.* at 43-44.

191 *Id.*

192 *Id.* at 43.

193 *Id.* at 43-44.

194 Resp. Br. at 34-35.

195 *Id.* at 41-42. As we found above, these factors are discretionary in application.

oversight, Respondent's failure to contractually forbid third parties from seeking payment from H-2B workers two years in a row demonstrates a pattern. As discussed above, Respondent's submission and signature on the TEC constitutes its acknowledgment and acceptance of the obligations of the H-2B program.[196] In addition, an employer's failure to read the terms of the TEC or properly learn the H-2B program's requirements amounts to a reckless disregard of the employer's obligations.[197] Thus, we find that Respondent acted in reckless disregard for the requirements of the H-2B program.

Respondent's failure to contractually forbid Monarch from collecting payments from H-2B workers also constitutes a substantial deviation from the terms and conditions of the H-2B program. First, Respondent admitted that this violation affected every H-2B worker.[198] Second, the gravity of this violation is severe. The purpose of this provision is to protect prospective workers,[199] and here every worker was affected.[200]

Therefore, Respondent substantially failed to meet the terms and conditions of Attestation 22 in violation of 29 C.F.R. § 503.16(p).

H. Document Retention Requirements

Attestation 26 and 29 C.F.R. § 503.17 require employers to retain for three years all documents relating to the TEC and registration, recruitment-related documents, and payroll records. The ALJ found that Respondent failed to retain documents as required.[201] The ALJ found that, although Respondent kept payroll records, Respondent failed to retain all of the remainder of the required documents, which includes records of H-2B workers' start and stop times, tasks completed, records showing it reimbursed workers for inbound and outbound travel and

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196 29 C.F.R. § 503.19(d).

197 80 Fed. Reg. at 24,086-87; *see C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, slip op. at 14, 14 n.72.

198 D. & O. at 44.

199 *See* 80 Fed. Reg. at 24,070.

200 D. & O. at 44.

201 *Id.*

subsistence, and records relating to its recruitment efforts of US workers.[202] The ALJ concluded that Respondent knew or should have known that it was required to retain documents, and that Respondent's failure to do so amounted to reckless disregard of its H-2B obligations.[203] The ALJ further concluded that this was a significant deviation.[204]

Respondent contends that merely knowing about a requirement is not enough to rise to the level of willfulness.[205] Respondent also contends that this alleged violation was not a significant deviation from its obligations because the ALJ failed to consider all five discretionary factors.[206] Once more, we disagree.

Respondent's failure to retain documents demonstrated a reckless disregard of its requirements under the H-2B program. As stated above, an employer's failure to read the terms of the TEC or properly learn the H-2B program's requirements amounts to reckless disregard.[207]

Respondent's failure to retain records also constituted a substantial deviation from the terms and conditions of the H-2B program. First, Respondent's failure to keep records affected every worker.[208] Second, document retention is critical to the DOL's enforcement abilities, and as such, Respondent's failure to do so represents an extremely grave violation.[209]

Therefore, we find that Respondent substantially failed to meet the terms and conditions of Attestation 26 in violation of 29 C.F.R. § 503.17.

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202 *Id.* Respondent argued that its payroll records were a sufficient record of hours worked; however, we have found that its method of recording hours was inadequate.

203 *Id.* at 45.

204 *Id.*

205 Resp. Br. at 35.

206 *Id.* at 42. As we found above, these factors are discretionary in application.

207 *See C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, slip op. at 14, 14 n.72.

208 D. & O. at 44-45.

209 *See* 80 Fed. Reg. at 24,086.

2. Remedies

If the Administrator determines that an employer has violated the requirements of the H-2B program, the Administrator may assess remedies, including the recovery of unpaid wages, CMPs, and debarment from the H-2B program.[210]

The Administrator may assess a CMP for each violation that is either a willful misrepresentation of a material fact; a substantial failure to meet any of the terms and conditions of the H-2B forms; or a willful misrepresentation of a material fact to the Department of State during the H-2B nonimmigrant visa application process.[211] "Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of [the aforementioned H-2B forms] constitutes a *separate violation*."[212]

For violations related to wages, impermissible deductions, or prohibited fees and expenses, Section 503.23(b) provides that the Administrator may assess CMPs "that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s)," subject to a maximum of $12,383.[213] Back wages further the purposes of the H-2B program by reducing the employer's incentive to bypass U.S. workers in order to hire H-2B workers who are more easily exploited.[214]

For all other violations, Section 503.23(d) provides that the Administrator may assess CMPs up to the maximum of $12,383 per violation.[215] Section 503.23(e) provides that, when assessing CMPs pursuant to paragraph (d), the Administrator may consider the following factors: (1) any previous history of H-2B violations by the employer; (2) the number of workers affected by the violation; (3) the gravity of

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210 29 C.F.R. § 503.20(a).

211 29 C.F.R. §§ 503.19, 503.23(a).

212 *Id.* § 503.23(a) (emphasis added).

213 *Id.* § 503.23(b). This maximum is adjusted by regulation. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat 584, 599 (2015). The maximum in effect in the present case was $12,383. *See Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7-01, 12 (Jan. 2, 2018).

214 *Butler Amusements*, ARB No. 2021-0007, slip op. at 31.

215 29 C.F.R. § 503.23(d).

the violation; (4) the good-faith efforts by the employer to comply; (5) the employer's explanation for the violation; (6) the employer's commitment to future compliance; and (7) the extent to which the employer achieved a financial gain or workers suffered a potential financial loss.[216] The "highest penalties" are reserved for willful failures to meet any of the conditions in the TEC and H-2B petition that "involve harm to U.S. workers."[217]

A. Respondent's Preliminary Arguments

Respondent challenges the ALJ's imposition of CMPs.[218] Respondent contends that the INA does not mandate CMPs and that, if CMPs are assessed, the Administrator must provide a reason in the determination letter.[219] Respondent argues that the Administrator's failure to provide a reason raises constitutional concerns.[220] However, as stated above, the Administrator may assess a CMP for each violation that is a substantial failure to meet any of the terms and conditions of the H-2B forms.[221] The Administrator and ALJ's imposition of CMPs against Respondent for their numerous violations of the H-2B program are consistent with the INA. In addition, as we found above, Respondent was reasonably apprised of the issues in controversy and had an opportunity to be heard, satisfying constitutional due process.

Respondent next argues that the ALJ should have used the three guideposts laid out by the Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, which includes: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm and the penalty; and (3) the difference between the remedy imposed and the penalties imposed in comparable cases.[222] Respondent

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216 *Id.* § 503.23(e). Respondent contends that this provision applies to Section 503.23(a) as well. However, we find that this language only applies to Section 503.23(d).

217 8 U.S.C. § 1184(c)(14)(C); 29 C.F.R. § 503.23(e).

218 Resp. Br. at 43.

219 *Id.* at 43-44.

220 *Id.* at 45.

221 29 C.F.R. §§ 503.19, 503.23(a).

222 Resp. Br. at 45 (citing to *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)).

contends that, under these guideposts, CMPs should not be awarded for any of the violations.[223]

The cases Respondent relies on pertain to punitive damages awarded in jury trials, and these guideposts are analyzed to determine whether a punitive damage award is excessive.[224] Punitive damage awards are common law creations guided by general principles of reasonableness.[225] Because CMPs are dictated by statute or regulation, that framework does not apply here.[226]

In the alternative, Respondent contends that the ALJ failed to analyze the seven Section 503.23(e) factors.[227] We find that the seven Section 503.23(e) factors are discretionary in application. The language of the regulations state that the Administrator "*may* consider"[228] the seven factors listed above. As such, these factors are nonmandatory. Consideration of these factors must be reasonably related to determining whether the employer significantly deviated from their obligations.

B. The ALJ Properly Determined the Amount of Back Wages Owed

The ALJ ordered Respondent to pay back wages for failing to pay H-2B workers the correct hourly wage rate, for failing to pay H-2B workers for all hours worked, and for failing to pay all inbound and outbound transportation and subsistence costs.[229] For the reasons stated below, we affirm the ALJ's findings.

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223 *Id.* at 45-47.

224 *Campbell*, 538 U.S. at 429 (reversing a judgment of punitive damages for being excessive and remanding for further proceedings); *Gore*, 517 U.S. at 586 (same).

225 *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15, 18 (1991); *Campbell*, 538 U.S. at 428.

226 *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973) (upholding administrative sanction that was more severe than sanctions imposed in other cases where the agency found it necessary to deter violations and achieve its statutory objectives).

227 Resp. Br. at 48-54.

228 29 C.F.R. § 503.23(e).

229 D. & O. at 57-58.

i. The Administrator's Reconstruction of Hours Worked and Methodology in Calculating the Amount of Back Wages Owed is Reasonable

The ALJ ordered Respondent to pay $133,960.50 in back wages to nineteen H-2B workers for 2016, and $167,487.55 in back wages to seventeen H-2B workers for 2017, for a total of $301,448.06.[230] Respondent contends that the ALJ erred in ordering back wages because the ALJ failed to find a Section 503.19 violation or the underlying determinations of "willfulness" and "significant deviation."[231]

The Board has repeatedly acknowledged the Administrator's authority to reconstruct hours worked and payments made to determine back wages when the employer's records are unreliable.[232] As discussed above, we find that Respondent's records are unreliable and that Respondent substantially failed to both pay H-2B workers the offered wage rate and failed to pay H-2B workers for all hours worked in violation of Attestation 5 and 29 C.F.R. §§ 503.16(a)(1), (a)(4), and (b). The Administrator reconstructed the hours worked by H-2B workers, as a matter of just and reasonable inference, based on the weekly average hours of U.S. workers who performed the same work as H-2B workers.[233] The Administrator then recalculated the amount of back wages Respondent owed each H-2B worker, for a total of $133,960.50 in 2016 and $167,487.55 in 2017.[234]

For the reasons set forth above, Respondent failed to adequately track the hours H-2B workers worked, failed to keep accurate records and its methodology was prone to errors, and the Administrator appropriately reconstructed the hours worked as a matter of just and reasonable inference. We find that the Administrator's recalculation is reasonable and supported by the record. Thus, we affirm the ALJ's finding that Respondent owes $301,448.06 in back wages.

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230 *Id.* at 33-34, 57.

231 Resp. Br. at 19, 25.

232 *Butler Amusements*, ARB No. 2021-0007, slip op. at 31. (citing to *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Peter's Fine Greek Foods*, ARB No. 2014-0003-B, ALJ No. 2011-TNE-00002, 2012-PED-00001, slip op. at 6 (ARB Sept. 17, 2014)).

233 D. & O. at 33.

234 *Id.* at 33-34.

ii. The ALJ's Calculation of Back Wages Owed for Inbound and Outbound Transportation and Subsistence Costs is Reasonable

The ALJ ordered Respondent to pay $5,863.56 in back wages for inbound travel and subsistence expenses in 2016 and 2017.[235] The ALJ based this on Administrator's calculations, which found an average of $168.26 per person multiplied by nineteen H-2B workers in 2016, and $156.26 per person multiplied by seventeen H-2B workers in 2017 for the five-day trip by bus from Mexico to Illinois.[236] Similarly, the ALJ ordered Respondent to pay $5,249.13 in back wages for outbound travel and subsistence expenses in 2016 based on the average cost of $267.27 per person for each of the nineteen H-2B workers for the three-day trip from Illinois to Mexico.[237] In calculating these averages, the Administrator used the average cost of hotels and bus tickets based on H-2B workers' employee interview statements.[238] For daily subsistence costs, the Administrator used the pre-determined price in the TEC.[239]

As discussed above, we find that Respondent substantially failed to pay all inbound transportation and subsistence costs for its H-2B workers in violation of Attestation 17 and 29 C.F.R. §§ 503.16(j)(1)(i)-(ii). The ALJ's calculation of back wages owed for all inbound and outbound transportation and subsistence costs is reasonable and supported by the record.[240] Moreover, Respondent has neither challenged this figure nor pointed to evidence that would contradict this calculation. Thus, we affirm the ALJ's finding that Respondent owes $5,863.56 in back wages for inbound travel and subsistence expenses in 2016 and 2017 and $5,249.13 in back wages for outbound travel and subsistence expenses for 2016.

C. Respondent is Liable for Civil Money Penalties

The ALJ found that Respondent was liable for CMPs. For the reasons stated below, we affirm the ALJ in part and vacate and modify the ALJ in part.

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235 *Id.* at 40-41, 57.

236 *Id.* at 40.

237 *Id.* at 40-41, 57.

238 *Id.* at 41.

239 *Id.*

240 *Id.* at 40-41.

i. Respondent is Ordered to Pay CMPs for Preferential Treatment of Foreign Workers

The Administrator initially assessed CMPs in the amount of $6,191.50 for 2016 and $6,191.50 for 2017 for both the failure to advertise housing and higher paying union jobs.[241] Because the ALJ found that neither Respondent's failure to advertise housing nor its failure to advertise union jobs constituted a substantial failure, the ALJ did not order Respondent to pay CMPs.[242]

For the reasons stated above, we find that Respondent failed to comply with the requirement that housing be advertised to U.S. workers if it was offered to foreign workers, which is a failure to comply with Attestation 4 and 29 C.F.R. § 503.16(q), and that CMPs are warranted. As stated above, we find that Respondent had a previous history of failing to advertise housing, the gravity was severe, and U.S. workers were harmed by Respondent's failure to advertise the availability of housing. We also find that Respondent did not make a good faith effort to comply. The record demonstrates that Respondent knew prior to the 2016 season that housing was available, but specifically said it was not available in the job orders for both 2016 and 2017.[243] Respondent has also failed to point to anything that would demonstrate that it acted in good faith.[244] Respondent also did not offer an adequate explanation for its actions. Although Guzman testified that he did not know housing would be available until he returned to Chicago in 2016 to find H-2B workers residing in his uncle's house, the record shows that H-2B workers stayed in that house in 2015 as well.[245] As such, Respondent's explanation is not credible. In addition, Respondent offered no explanation regarding the 2017 season.[246]

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241 *Id.* at 19 n.109.

242 *Id.* at 22.

243 *Id.*

244 *Adm'r, Wage &Hour Div., U.S. Dep't of Lab. v. Five M's LLC*, ARB No. 2019-0014, ALJ Nos. 2015-FLS-00010, -00011, slip op. at 9, 11, 13 (ARB Nov. 13, 2020) (finding that the respondent failed to make a good faith effort to comply with the regulations because it produced no evidence that it acted reasonably or in good faith).

245 Tr. at 37-39, 80-81.

246 D. & O. at 20-22.

Thus, we find that Respondent must pay $3,095.75 for 2016 and $3,095.75 for 2017, for a combined total of $6,191.50. This amount is fair and reasonable given that this violation harmed U.S. workers, and it is also under the $12,383 maximum.

ii. Respondent is Ordered to Pay CMPs for Failing to Pay the Offered Wage

As stated above, we affirm the ALJ's finding that Respondent substantially failed to comply with Attestation 5 in violation of 29 C.F.R. §§ 503.16(a)(1), (a)(4), and (b) by failing to pay the offered wage. Thus, we find that CMPs are warranted.

The Administrator initially assessed $133,960.50 in CMPs in 2016 and $161,590.73 in CMPs in 2017 for Respondent's failure to pay the wage listed on the TEC, for a total CMP of $295,551.23.[247] The Administrator assessed a separate violation for each worker.[248] The ALJ reduced the CMP to $40,188.15 for 2016 and $48,477.22, for a total CMP of $88,665.37.[249] The ALJ opined that the Administrator did not assess any mitigating factors, and found that the following mitigating factors applied: (1) Respondent's lack of a history of violations; (2) Respondent's commitment to future compliance demonstrated by changes it made; (3) the relatively small size of Respondent's business;[250] and (4) the fact that U.S. workers were not harmed.[251]

The Administrator contends that the ALJ erred in applying the Section 503.23(e) discretionary factors to a wage violation.[252] We agree. The Section 503.23(e) factors only apply to Section 503.23(d), and do not apply to Section 503.23(b) wage violations.[253] Rather, for wage violations, the Administrator may assess CMPs equal to the back wages owed.[254] In addition, Section 503.23(a) states that "[e]ach such violation involving the failure to pay an individual worker

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247 *Id.* at 46.

248 *Id.*

249 *Id.* at 47.

250 *Id.* (citing to *A&M Labor Mgmt., Inc.*, ALJ Nos. 2022-MSP-00002, 2022-TAE-00004, slip op. at 19 (ALJ Mar.23, 2023)).

251 *Id.*

252 Administrator's Br. at 20.

253 29 C.F.R. § 503.23(e).

254 *Id.* § 503.23(b).

properly or to honor the terms or conditions of [the aforementioned H-2B forms] constitutes a *separate violation*."[255]

Next, the Administrator contends that the ALJ erred in reducing the amount of CMPs based on Respondent's business size.[256] The Administrator asserts that business size is not a factor listed anywhere in the statute or regulations, and that even if business size were a proper consideration, here it would be arbitrary, capricious, and is not supported by substantial evidence because the ALJ relied on nothing more than Respondent's self-reported annual gross sales.[257]

Respondent counters that the excessive fines clause of the Eighth Amendment requires the evaluation of a penalty in terms of its relationship to the revenues of the business.[258] Respondent contends that the ALJ was within his discretion to consider Respondent's business size and revenue in reducing the CMPs.[259]

As the Administrator correctly notes, the H-2B regulations do not provide for an employer's business size, revenue, or financial hardship as a mitigating factor.[260] Thus, we find that the ALJ erred in considering the size of Respondent's business. Therefore, we vacate the ALJ's finding and order Respondent to pay $133,960.50 in CMPs in 2016 and $161,590.73 in CMPs in 2017 for Respondent's failure to pay the wage listed on the TEC, for a total CMP of $295,551.23. We find that this amount is reasonable and supported by the record.[261]

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255 *Id.* § 503.23(a) (emphasis added).

256 Administrator's Br. at 20.

257 *Id.*

258 Resp. Response Br. at 26-29.

259 *Id.* at 29.

260 Administrator's Br. at 30-32; 29 C.F.R. § 503.23(e).

261 In addition, Respondent contends that the ALJ's CMP award for back wages constitutes an improper double punishment. Resp. Br. at 54. However, back wages do not punish employers, but instead make employees whole. *See, e.g.*, *Brooklin Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (2022) (stating that FLSA back wages and liquidated damages are not penal in nature but are "compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages"); *Birbalas v. Cuneo Printing Indus.*, 140 F.2d 826, 828 (7th Cir. 1944) (stating that FLSA back wages and liquidated damages are "not a penalty or punishment by the Government").

iii. Respondent is Ordered to Pay CMPs for Employing H-2B Workers Outside the Area of Intended Employment

As stated above, we find that Respondent substantially failed to comply with Attestation 11 in violation of 29 C.F.R. § 503.16(x). Thus, we find that CMPs are warranted.

The Administrator initially assessed $18,574.50 in CMPs for 2016 and $18,574.50 for 2017.[262] In calculating CMPs, the WHD used a base CMP of $6,191.50 per violation. WHD then determined there were three separate violations, one for each of the three states in which Respondent employed H-2B workers that were not listed in the areas of intended employment.[263] The ALJ reduced the CMPs, finding that although the gravity of the violation was significant, Respondent had a lack of history of violations, Guzman committed to future compliance, and Guzman was unaware that H-2B workers could not leave the area of intended employment.[264] The ALJ also found that it was unreasonable to multiply the penalty by the number of states outside the area of intended employment that Respondent sent workers, finding that WHD did not offer "any compelling legal authority to support multiplying a single CMP by the number of states to which Respondent sent its workers."[265] The ALJ reduced the CMP to $4,953.20 per year for a total of $9,906.40.[266]

The Section 503.23(e) factors weigh against Respondent. First, every H-2B worker was affected during 2016 and 2017.[267] Second, we agree with the ALJ that the gravity of this violation is significant. The regulations require employers to identify the area of employment so that the DHS and DOL can determine whether qualified U.S. workers cannot be found in the U.S. prior to approving an H-2B petition.[268] Respondent failed to identify forty-five cities across four states in which H-2B workers worked outside the areas of intended employment during 2016 and

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262 D. & O. at 48.

263 *Id.*

264 *Id.* at 49.

265 *Id.*

266 *Id.*

267 *Id.* at 11-12, 36-37.

268 *See* 80 Fed. Reg. at 24,045.

2017.[269] Because Respondent failed to identify these additional locations, DHS and DOL were unable to assess whether qualified U.S. workers were available in these locations.

Third, Respondent did not make a good faith effort to comply. Respondent contends it was unaware of this obligation.[270] However, pleading ignorance is not sufficient to show that one acted in good faith.[271]

Fourth, we are not persuaded by Respondent's explanation that "workers worked outside of the area of intended employment was of brief duration and sporadic and not subject to advance anticipation such that it was impossible to ascertain in advance and conduct" recruitment efforts.[272] Respondent further claims that it was unaware that it was required to specify all locations.[273] However, the TEC instructions were clear that Respondent was to "identify the geographic place(s) of employment with *as much specificity as possible*. If necessary, submit an attachment to *continue and complete* a listing of all anticipated workplaces".[274] As stated above, an employer's submission and signature on the TEC constitutes the employer's representation that the statements are accurate and its acknowledgement and acceptance of the obligations of the program.[275] Again, an employer's failure to read the terms of the TEC or properly learn the H-2B program's requirements amounts to a reckless disregard of the employer's obligations.[276] In addition, Respondent's excuse that it was impossible to ascertain that it would send workers outside the area of intended employment may have been plausible for 2016, but we find it unconvincing for 2017 given the number of times that Respondent sent workers outside the area of intended employment in 2016. Thus, we find that $6,191.50 per violation is appropriate.

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269 D. & O. at 11-12, 36-37.

270 Resp. Br. at 34.

271 *Butler Amusements, Inc.*, ARB No. 2021-0007, slip op. at 27.

272 Resp. Response Br. at 33.

273 Resp. Br. at 34.

274 JX C; JX D (emphasis added).

275 29 C.F.R. § 503.19(d).

276 80 Fed. Reg. at 24,086-87; *see C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, slip op. at 14, 14 n.72.

Next, we find that the ALJ erred in holding that it was unreasonable to multiply the penalty by the number of states outside the area of intended employment that Respondent sent workers. Section 503.23(a) states that each violation involving the failure to pay an individual worker properly constitutes a separate violation.[277] In addition, in *5 Star Forestry*, the employer placed H-2B workers in four locations outside of the area of intended employment and did not undertake recruitment measures at any of these four locations.[278] The Board held that each location constituted a separate violation, reasoning that:

> [B]ecause, for each location, the employer has failed to conduct the recruitment and hiring efforts necessary to ensure that there are no workers in the U.S. available to perform the work. By holding employers financially accountable for each location (rather than assessing a single violation regardless of the number of unidentified employment areas), the policy also intends to diminish employers' motivation to commit multiple employment area violations.[279]

Thus, we find Respondent committed a separate violation for each state in which Respondent placed H-2B workers that was outside the area of intended employment.[280] Accordingly, we vacate the ALJ's finding and order Respondent to pay $6,191.50 per violation, for a total of $18,574.50 in CMPs for 2016 and $18,574.50 for 2017.

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277 29 C.F.R. § 503.23(a) (emphasis added).

278 *5 Star Forestry*, ARB No. 2013-0056, slip op. at 6.

279 *Id.*

280 Respondent contends that this case is different from *5 Star Forestry* because in that case the workers spent more time outside the area of intended employment. However, this argument ignores the fact that there were 45 cities across several states that H-2B workers worked in that were not listed in the area of intended employment and that Respondent failed to undertake recruitment efforts in any of these locations.

iv. Respondent is Ordered to Pay CMPs for Failing to Pay for All Transportation and Subsistence Fees

As stated above, we find that Respondent substantially failed to comply with Attestation 17 in violation of 29 C.F.R. §§ 503.16(j)(1)(i)-(ii). Thus, we find that CMPs are warranted.

The Administrator initially assessed $5,863.56 in CMPs for Respondent's failure to pay inbound expenses for 2016 and 2017, and $5,249.13 for Respondent's failure to pay outbound expenses in 2016.[281] The ALJ reduced the CMPs because WHD failed to assess the following mitigating factors: (1) Respondent's lack of a history of violations, (2) Respondent's good faith efforts to comply; (3) Guzman's explanation that he was unaware that he was responsible for inbound and outbound transportation and subsistence expenses, and (4) Respondent's commitment to future compliance.[282] The ALJ reduced the CMP by ten percent for each factor.[283]

However, as with subsection two, the ALJ erred in assessing the mitigating factors in Section 503.16(e), which do not apply here because this is a wage violation.[284] Because the ALJ used the wrong standard, we vacate the ALJ's finding and order Respondent to pay the initial amount of CMPs assessed by the WHD. The WHD's amount is reasonable given that it assessed one amount of CMPs for inbound violations and another for outbound. These numbers are also under the $12,383 limit. Thus, Respondent is ordered to pay $5,863.56 in CMPs for Respondent's failure to pay inbound expenses for 2016 and 2017, and $5,249.13 for Respondent's failure to pay outbound expenses in 2016, for a total of $11,112.69.

v. Respondent is Ordered to Pay CMPs for Failing Disclose a Copy of the Job Order

For failing to disclose a copy of the job order, the Administrator initially assessed CMPs of $5,572.35 for 2016 and $5,572.35 for 2017.[285] The ALJ reduced the CMP based on the following mitigating factors: (1) a twenty percent reduction

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281 D. & O. at 50.

282 *Id.* at 50-51.

283 *Id.* at 51.

284 29 C.F.R. § 504.23(b).

285 D. & O. at 51.

based on Respondent's lack of a history of violations, and (2) a ten percent reduction based on Guzman's explanation that he was unaware of Monarch's internal processes and trusted that the company would comply with all requirements.[286] The ALJ ordered Respondent to pay a CMP of $3,714.90 per violation for a total of $7,429.80.[287]

We agree with the ALJ's analysis. The ALJ's D. & O. was well reasoned and is supported by the record. We also find that the ALJ's calculations in determining the amount of CMPs owed was reasonable and within the limit. Thus, Respondent is ordered to pay $7,429.80 for their substantial failure to comply with 29 C.F.R. § 503.16(l).

vi. *Respondent is Ordered to Pay CMPs for Failing to Contractually Prohibit Third Parties from Seeking Payment from H-2B Workers*

For failing to contractually forbid third parties from seeking payment from H-2B workers, the Administrator initially assessed CMPs of $1,238.30 in 2016 and $1,238.30 in 2017.[288] The Administrator applied the following mitigating factors: (1) the gravity of the violation; (2) Respondent's compliance efforts; (3) Respondent's explanation; and (4) Respondent's commitment to future compliance.[289] The ALJ agreed with these reductions and further reduced the CMP by ten percent because of Respondent's lack of prior violations.[290] Thus, the ALJ ordered Respondent to pay a CMP of $619.15 for each violation in 2016 and 2017, for a total of $$1,238.80.[291]

We agree with the ALJ's analysis. The ALJ's D. & O. was well reasoned and is supported by the record. We also find that the ALJ's calculations in determining the amount of CMPs owed was reasonable and within the limit. Thus, Respondent is ordered to pay $1,238.30 for Respondent's substantial failure to comply with 29 C.F.R. § 503.16(p).

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286 *Id.* at 51-52.

287 *Id.* at 52.

288 *Id.*

289 *Id.* at 52-53.

290 *Id.* at 53.

291 *Id.*

vii. Respondent is Ordered to Pay CMPs for Failing to Retain Documents

The Administrator initially assessed CMPs of $6,191.50 in 2016 and $6,191.50 in 2017 for Respondent's substantial failure to comply with document retention requirements.[292] The base CMP was $6,191.50.[293] The Administrator had increased the CMPs by ten percent for the gravity of the violation, but decreased the CMPs by ten percent because Respondent committed to future compliance.[294] The ALJ agreed with the Administrator's mitigating factors and further reduced the CMP by ten percent based on Respondent's lack of prior violations.[295] Thus, the ALJ ordered Respondent to pay a CMP of $4,953.20 for each violation in 2016 and 2017, for a total of $9.906.40.[296]

We agree with the ALJ's analysis. The ALJ's D. & O. was well reasoned and is supported by the record. We also find that the ALJ's calculations in determining the amount of CMPs owed was reasonable and within the limit. Thus, Respondent is ordered to pay $9,906.40 for Respondent's substantial failure to comply with 29 C.F.R. § 503.17.

3. Debarment

An employer may be debarred from the H-2B program for one to five years if it: (1) committed a willful misrepresentation[297] of a material fact in its H-2B forms; (2) substantially failed to meet any of the terms and conditions of the wage determination, TEC, or H-2B petition;[298] or (3) committed a willful

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292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.*

297 "A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows a statement is false or that the conduct isn't violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions." 20 C.F.R. § 655.73(d).

298 In determining whether a violation is a significant deviation from the terms and conditions of the H-2B forms, an ALJ may consider factors including, but not limited to the factors listed in 20 C.F.R. § 655.73(e) (previous history of violations, numbers of affected

misrepresentation of a material fact during the visa application process.[299] The regulations list twelve violations that may justify debarment, which includes the failure to pay required wages, the employment of H-2B workers outside the area of intended employment, and "[a]ny other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected."[300] "The appropriate period of debarment [is] based on the severity of the violation."[301]

Because Respondent violated 29 C.F.R. §§ 503.16(a)(1), (a)(4), and (b), and 503.16(x), the ALJ debarred Respondent.[302] The Administrator argued that Respondent should be debarred for three years.[303] Respondent countered that a formal debarment was unnecessary because Guzman had not applied for the H-2B program in 2019, 2020, or 2021 while this case was pending.[304] The ALJ found that this argument was not dispositive because debarment does not begin until "the date of the *final* agency action."[305] The ALJ credited Respondent's commitment to future compliance, and found that a one-year debarment was reasonable and appropriate.[306]

The Administrator contends that the ALJ erred in reducing Respondent's debarment to one year.[307] The Administrator argues that the ALJ did not give due consideration to the gravity of Respondent's violations and gave undue weight to the Respondent's promise of future compliance.[308] The Administrator further

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workers, gravity of the violations, extent of financial gain or potential loss or injury, and whether U.S. workers were harmed).

299 *Id.* § 655.73(a); 29 C.F.R. § 503.24(c).

300 29 C.F.R. § 503.24(a).

301 80 Fed. Reg. at 24,084.

302 D. & O. at 54-56.

303 *Id.* at 55.

304 *Id.* at 56.

305 *Id.* (citing 29 C.F.R. § 503.24(c) (emphasis added)).

306 *Id.*

307 Administrator's Br. at 43.

308 *Id.*

contends that, by reducing the debarment period to the minimum, the ALJ ignored his conclusions that Respondent "flagrantly disregarded the law."[309]

In *Administrator v. Peter's Fine Greek Food*, the Board held that, when analyzing the issue of debarment, the Board must consider two questions: first, do grounds exist to debar the employer; and second, if so, how long should the employer be debarred.[310] The Board also held that an employer's commitment to future compliance is one of the many factors that an ALJ may consider.[311] However, the Board warned that such compliance should be considered cautiously where "the Administrator had no opportunity to investigate assertions of post investigation compliance."[312]

Regarding whether grounds exist to debar Respondent, as stated above, we have found that Respondent substantially failed to meet the terms and conditions set forth in the H-2B forms for the reasons discussed above for two violations that justify debarment: (1) the failure to pay required wages and (2) employing H-2B workers outside the area of intended employment.

Regarding the length of debarment, we vacate the ALJ's order of a one-year debarment and order that Respondent be debarred for three years. Although Respondent has demonstrated a commitment to future compliance, given the severity of Respondent's failure to pay the required wage, the number of times it employed H-2B workers outside of the areas of intended employment, and Respondent's disregard for the rules and regulations of the H-2B program, we find that a three-year debarment is appropriate.

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309 *Id.* at 44.

310 *Peter's Fine Greek Food*, ARB No. 2014-0003-A, slip op. at 3.

311 *Id.* at 5.

312 *Id.*

CONCLUSION[313]

Accordingly, we **AFFIRM** the ALJ's Decision and Order in part and **VACATE** and **MODIFY** in part. Respondent is ordered to pay the following back wages and CMPs:

- $301,448.06 in back wages for failing to pay H-2B workers the offered wage;
- $11,112.69 in back wages for inbound and outbound travel and subsistence costs;
- $6,191.50 in CMPs for substantially failing to comply with Attestation 4 in violation of 29 C.F.R. § 503.16(q);
- $295,551.23 in CMPs for substantially failing to comply with Attestation 5 in violation of 29 C.F.R. §§ 503.16(a)(1), (a)(4), and (b);
- $37,149 in CMPs for substantially failing to comply with Attestation 11 in violation of 29 C.F.R. § 503.16(x);
- $11,112.69 in CMPs for substantially failing to comply with Attestation 17 in violation of C.F.R. §§ 503.16(j)(1)(i)-(ii);
- $7,429.80 in CMPs for substantially failing to comply with Attestation 19 in violation of 29 C.F.R. § 503.16(l);
- $1,238.30 in CMPs for substantially failing to comply with Attestation 22 in violation of 29 C.F.R. § 503.16(p); and
- $9,906.40 in CMPs for substantially failing to comply with Attestation 26 in violation of 29 C.F.R. § 503.17.

SO ORDERED.

IVEY S. WARREN
Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

[313] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).